

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to modify OWCP's February 19, 2010 loss of wage-earning capacity (LWEC) determination.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on July 11, 2005 appellant, then a 48-year-old rural carrier, sustained a right elbow contusion, right elbow/forearm sprain, neck strain, and right shoulder sprain/strain when a heavy box fell on her right arm and elbow while in the performance of duty. It assigned the claim OWCP File No. xxxxxx579.<sup>4</sup> On November 29, 2007 appellant filed a Form CA-2 alleging injury to her right upper extremity due to her repetitive work duties. OWCP assigned the claim File No. xxxxxx564 and accepted it for right carpal tunnel syndrome.<sup>5</sup> Appellant underwent OWCP-authorized right shoulder surgeries, including rotator cuff repair, anterior decompression, and acromioplasty on February 26, 2007, and repeat rotator cuff repair on August 31, 2009. She stopped work for various periods and received wage-loss compensation for disability from work. On November 5, 2009 appellant returned to full-time work at the employing establishment as a permanent modified clerk. The position was consistent with her work restrictions of not lifting more than five pounds.<sup>6</sup>

By decision dated February 19, 2010, OWCP found that the actual wages of the modified clerk position appellant began on November 5, 2009 fairly and reasonably represented her wage-earning capacity. It noted, "Your actual earnings meet or exceed the current wages of the job held when injured. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115 your entitlement to compensation for wage loss ended the date you were reemployed with no loss in earning capacity, and your compensation payments have been terminated." OWCP indicated that the decision did affect coverage of appellant's ongoing medical benefits.

On January 27, 2011 appellant filed a claim for compensation (Form CA-7) for wage loss during the period January 19 through 21, 2011. She later filed forms alleging wage loss continuing

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<sup>3</sup> Docket No. 11-1671 (issued February 23, 2012).

<sup>4</sup> On August 3, 2004 filed an occupational disease claim (Form CA-2) alleging injuries to her neck and right upper extremity due to delivering mail. OWCP assigned the claim OWCP File No. xxxxxx536 and accepted it for cervical and right shoulder sprains. On September 1, 2004 appellant was released to regular duty.

<sup>5</sup> OWCP administratively combined OWCP File Nos. xxxxxx536, xxxxxx564, and xxxxxx579, with the latter file serving as the master file.

<sup>6</sup> The duties of the job were clerical in nature and the physical requirements were simple grasping up to five pounds for up to eight hours per day, pushing and pulling one to two pounds no higher than shoulder level for up to eight hours per day, and fine manipulation of less than five pounds for up to eight hours per day. In early 2010, appellant's lifting restriction was raised to 10 pounds.

after January 21, 2011. The employing establishment had made a determination that no work was available for appellant as part of the National Reassessment Process (NRP).

In a February 24, 2011 letter, OWCP advised appellant of the deficiencies of her claim for compensation. It informed her that, in order to be entitled to compensation, her wage-loss claim must be treated as a claim for modification of the previously established February 19, 2010 LWEC determination. OWCP advised appellant of the three criteria necessary for modifying such decisions, *i.e.*, that there was a material change in the nature and extent of the injury-related condition, the employee had been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. It afforded her 30 days to provide evidence substantiating that she had met any of the criteria.

Appellant submitted a Form CA-7 covering the period February 28 to March 11, 2011, a functional requirement list, and several progress notes from early 2011 which contained illegible signatures. In a March 17, 2011 letter, appellant's representative at the time asserted that the February 19, 2010 LWEC determination was based on "make[-]shift work." He claimed that the make-shift nature of the permanent modified clerk position was supported by the fact that appellant later received several limited-duty job offers. The representative noted that, as part of the NRP, appellant's limited-duty job offer assignments had been withdrawn and eliminated.

By decision dated April 18, 2011, OWCP denied appellant's request for modification of its February 18, 2010 LWEC determination, noting that the evidence submitted by appellant was not relevant to the matter.

Appellant appealed the case to the Board and, by decision dated February 23, 2012,<sup>7</sup> the Board affirmed OWCP's April 18, 2011 decision, finding appellant had not met her burden of proof to modify OWCP's February 19, 2010 LWEC determination. It found that there was no evidence that appellant's actual earnings in the modified clerk position for more than 60 days did not fairly and reasonably represent her wage-earning capacity. The Board determined that the modified clerk position had detailed work duties and a set schedule, and found that appellant's later receipt of several limited-duty job offers and the elimination of her job by the NRP were insufficient to show that the position was make-shift in nature. Therefore, it concluded that appellant had not shown that the original LWEC determination was erroneous. The Board also found that the medical evidence of record was insufficient to demonstrate that an employment-related condition prevented appellant from performing the modified clerk position or that she had been retrained or otherwise vocationally rehabilitated such that her work as a modified clerk would not be representative of her wage-earning capacity.

The case record indicates that OWCP paid appellant schedule award benefits from July 26, 2011 to October 4, 2012 and she collected unemployment benefits until she commenced working on February 1, 2014 in a full-time, limited-duty job as a modified sales associate. In early April 2017, the employing establishment advised appellant that her modified sales associate job was ending and it offered her a different limited-duty job effective April 14, 2017. Appellant declined the limited-duty job offer, asserting that it was not within her work restrictions.

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<sup>7</sup> *Supra* note 3.

On May 15, 2017 appellant filed a claim for compensation alleging entitlement to wage-loss compensation for the period April 15 through 28, 2017.<sup>8</sup>

In a May 25, 2017 development letter, OWCP advised appellant of the evidence needed to support modification of OWCP's February 19, 2010 LWEC determination. It afforded her 30 days to submit the requested evidence.

Appellant submitted a June 2, 2017 report from Dr. Gary Schuster, a Board-certified internist, who noted that appellant reported pain in her right shoulder, numbness/tingling and pain in her right upper extremity and right hand, weakness in her right hand, and pain in her cervical region. Dr. Schuster provided findings of his physical examination and opined that appellant's employment-related conditions/symptoms had worsened after February 19, 2010.

By decision dated July 5, 2017, OWCP denied modification of OWCP's February 19, 2010 LWEC determination because appellant had not established that modification of that determination was warranted. By decision of even date, it also denied appellant's claim for wage-loss compensation for the period April 15, 2017 and ongoing because she had not shown that modification of OWCP's LWEC determination was warranted and had not otherwise shown that the medical evidence of record established entitlement to such wage-loss compensation.

On July 14, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted additional medical evidence, including a June 22, 2017 duty status report (Form CA-17) from Dr. Schuster in which he imposed work restrictions including engaging in intermittent pushing/pulling for no more than two hours per day, simple grasping for no more than five hours per day, and no engaging in continuous lifting.

During the hearing held on January 16, 2018, counsel argued that OWCP's original February 19, 2010 LWEC determination was erroneous. He asserted that the modified clerk position appellant initially held in 2009 could not serve as the basis for the February 19, 2010 LWEC determination because it was improper to create a permanent modified position across a work craft classification for any postal employee. Appellant suggested that OWCP's February 19, 2010 LWEC determination was erroneous because she received several limited-duty job offers after starting work as a modified clerk and because the modified clerk job was eliminated by the NRP.

In an April 2, 2018 decision, OWCP's hearing representative set aside OWCP's April 15, 2017 decisions and remanded the case to OWCP for further development. The representative found that OWCP previously had correctly determined that appellant failed to establish that OWCP's February 19, 2010 LWEC determination was erroneous. As well, it had not been shown that appellant had been retrained or rehabilitated such that modification of the wage-earning capacity decision was warranted. However, the hearing representative found that the medical evidence from Dr. Schuster necessitated further development regarding whether appellant's

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<sup>8</sup> Appellant later filed additional claims for compensation alleging entitlement to wage-loss compensation for the period April 29 through September 22, 2017.

employment-related condition rendered her disabled from work. He directed OWCP to refer appellant for a second opinion examination with an appropriate specialist to address whether there was objective evidence of a material worsening of her injury-related medical conditions when she stopped working on April 15, 2017, and if so, whether the effects of the work injury would have prevented appellant from performing the duties of the modified clerk position that she initially held in 2009.<sup>9</sup>

On January 21, 2019 OWCP referred appellant for a second opinion examination to Dr. Clarence Fossier, a Board-certified orthopedic surgeon. It requested that Dr. Fossier provide an opinion regarding appellant's employment-related residuals/disability, including an opinion regarding whether appellant's injury-related condition prevented her from performing the modified clerk position she initially held in 2009. OWCP provided Dr. Fossier with a copy of the case record, including a recent statement of accepted fact (SOAF) that discussed all of appellant's accepted employment injuries.

In a February 18, 2019 report, Dr. Fossier discussed appellant's factual and medical history and outlined her current symptoms. He also described appellant's physical examination findings and diagnosed status post repair/revision of a rotator cuff tear of the right shoulder, bilateral carpal tunnel syndrome (right worse than left) with no evidence of thoracic outlet syndrome, and right lateral epicondylitis. Dr. Fossier indicated that appellant's medical condition had been stable since April 14, 2017 and there was no objective evidence of material worsening. He opined that appellant was not capable of returning to her date-of-injury job because of the amount of lifting and overhead lifting necessary. However, Dr. Fossier opined that she would have been able to perform the duties of the modified clerk position she initially held in 2009. He noted that appellant's only restriction would be no repetitive lifting over shoulder level using her right arm.

OWCP determined that there was a conflict in the medical opinion between Dr. Schuster, and Dr. Fossier regarding the extent of appellant's employment-related residuals/disability. On March 19, 2019 it referred appellant, pursuant to section 8123(a) of FECA, to Dr. Joel Krakauer, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter. OWCP requested that Dr. Krakauer provide an opinion regarding appellant's employment-related residuals/disability, including an opinion regarding whether appellant's injury-related conditions prevented her from performing the modified clerk position she initially held in 2009. It provided Dr. Krakauer a copy of the case record, including a recent SOAF that discussed all of appellant's accepted employment injuries.

In an April 8, 2019 report, Dr. Krakauer discussed appellant's factual and medical history and summarized the medical reports of record. He reported physical examination findings and diagnosed right elbow contusion, right elbow sprain/strain, cervical strain, right shoulder rotator cuff tear (status postoperative repair) and right carpal tunnel syndrome, noting that appellant continued to have residuals of her accepted employment injuries. Dr. Krakauer indicated that there was no objective basis to support a worsening of the accepted conditions when appellant stopped work on April 15, 2017. He acknowledged that appellant's continuing employment-related residuals included restricted motion of the right shoulder in all planes, clinical evidence of ongoing

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<sup>9</sup> On April 23, 2018 OWCP received a notice of separation form documenting that appellant retired from the employing establishment effective April 9, 2018.

carpal tunnel syndrome on the right, mild stiffness of the right elbow, and persistent tenderness over the lateral elbow. Dr. Krakauer explained that appellant was restricted with regard to shoulder elevation and rotation and had restriction with regard to repetitive use of the right hand. He advised that she was not capable of returning to her normal job as a rural mail carrier, but was still capable of employment in a modified capacity. Dr. Krakauer further advised that he had reviewed the modified clerk position, and noted that the specific requirements did not require the use of the shoulder overhead and that the job activities appeared varied and did not require substantial force. He agreed with Dr. Fossier that the effects of the work injury would not have prevented appellant from performing these activities and that the specific activities of the modified clerk position were acceptable. Dr. Krakauer concluded that appellant had residuals of her accepted employment injuries and opined that, although appellant was incapable of returning to her normal job as a rural mail carrier due the position's lifting requirements, she had been capable of employment as a modified clerk.

By decision dated April 24, 2019, OWCP denied appellant's request for modification of its original February 19, 2010 LWEC determination because the evidence did not substantiate that any of the three criteria for modifying a formal LWEC were met.<sup>10</sup>

On May 2, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

During the hearing held on August 14, 2019, counsel acknowledged that at the time appellant was placed in the permanent modified clerk position it was a bona fide position and one that she could have performed. However, he argued that the subsequent determination that crossing crafts constituted a bargaining agreement violation rendered the prior decision to place appellant in the permanent modified clerk position inappropriate. Appellant testified that she retired effective April 9, 2018 and had remained off all work between April 15, 2017 and April 9, 2018.

After the hearing, appellant submitted a September 7, 2019 statement in which she argued that the original February 19, 2010 LWEC determination was in error because the modified clerk position did not consider all of her accepted employment injuries. She submitted copies of the modified assignments she received prior to the February 19, 2010 LWEC determination and several offers she received after that determination, four notice of personnel action forms, a February 15, 2011 employee leave information letter, and a March 13, 2017 sales retention team letter. Appellant also submitted copies of medical reports that were previously of record and were considered prior to the time OWCP issued its April 18, 2011 decision which was affirmed by the Board on February 23, 2012, including reports from 2009 of Dr. Schuster and reports from 2009 of Dr. Dennis J. Kvidera, a Board-certified orthopedic surgeon.

By decision dated October 29, 2019, OWCP's hearing representative affirmed the April 24, 2019 decision.

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<sup>10</sup> OWCP further indicated that, as appellant had not established that modification of the February 19, 2010 LWEC determination was warranted, her request for wage-loss compensation for the period April 15 through September 22, 2017 was denied.

## **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>11</sup> Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>12</sup> A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.<sup>13</sup> Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.<sup>14</sup>

OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings. Reemployment may not be considered representative of the injured employee's wage-earning capacity when an injured employee who has been released to full-time work is working less than full-time hours, the job is temporary where the employee's job when injured was permanent, and the job represents permanent seasonal employment in an area where year-round employment is available (unless the employee was a career seasonal or temporary employee when injured).<sup>15</sup> In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.<sup>16</sup> The Board has discussed several factors that may support a finding that the offered position was makeshift in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated appellant would not be able to secure a position in the community at large with such limited duties; (3) appellant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.<sup>17</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally

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<sup>11</sup> 5 U.S.C. § 8115(a); *see O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>12</sup> *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

<sup>14</sup> *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5c(2) (June 2013). In locations where year-round jobs are scarce, a seasonal position may represent the wage-earning capacity of an employee who previously held a year-round job. *Id.*

<sup>16</sup> *See A.J.*, Docket No. 10-0619 (issued June 29, 2010).

<sup>17</sup> *Id.* *See also V.H.*, Docket No. 13-2076 (issued March 5, 2014).

rehabilitated, or the original determination was, in fact, erroneous.<sup>18</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>19</sup>

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”<sup>20</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>21</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to modify OWCP’s February 19, 2010 LWEC determination.

As noted, the Board previously affirmed OWCP’s April 18, 2011 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>22</sup> Accordingly, the current analysis is limited to the relevant evidence received since OWCP’s April 18, 2011 merit decision, which is the evidence that was not before the Board when it last reviewed appellant’s claim on February 23, 2012.

The Board finds that, appellant has not submitted sufficient evidence or argument following the Board’s February 23, 2012 decision to establish that OWCP’s February 23, 2012 LWEC determination was erroneous. Appellant argued that the modified clerk position she initially held in 2009 could not serve as the basis for the February 19, 2010 LWEC determination because it was improper to create a permanent modified position across a work craft classification for any postal employee. She also repeated her earlier argument that her later receipt of several limited-duty job offers and the elimination of her job by the NRP established that the modified clerk position was make-shift in nature. However, appellant still has not provided adequate support for these arguments. For these reasons, the Board finds that she has not established that OWCP’s February 23, 2012 LWEC determination was erroneous.

With respect to whether modification of OWCP’s February 19, 2010 LWEC determination is warranted because her injury-related condition had worsened such that she could no longer work in the modified clerk position, the Board notes that, in 2019, OWCP

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<sup>18</sup> *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.3a (June 2013).

<sup>19</sup> *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>20</sup> 5 U.S.C. § 8123(a).

<sup>21</sup> *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>22</sup> See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).



properly determined that there was a conflict in the medical opinion between Dr. Schuster, an attending physician, and Dr. Fossier, an OWCP referral physician, regarding the extent of appellant's employment-related residuals/disability. It then properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Krakauer, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>23</sup>

In an April 8, 2019 report, Dr. Krakauer diagnosed right elbow contusion, right elbow sprain/strain, cervical strain, right shoulder rotator cuff tear (status postoperative repair) and right carpal tunnel syndrome, noting that appellant continued to have residuals of her accepted employment injuries. He acknowledged that appellant's continuing employment-related residuals included restricted motion of the right shoulder in all planes, clinical evidence of ongoing carpal tunnel syndrome on the right, mild stiffness of the right elbow, and persistent tenderness over the lateral elbow. Dr. Krakauer further advised that he had reviewed the modified clerk position, and noted that the specific requirements did not require the use of the shoulder overhead and that the job activities appeared varied and did not require substantial force. He opined that appellant's employment-related condition did not prevent her from performing these activities. Dr. Krakauer concluded that, although appellant had residuals of her accepted employment injuries and was incapable of returning to her normal job as a rural mail carrier, she had been capable of working as a modified clerk.

The Board finds that Dr. Krakauer's well-rationalized April 8, 2019 report shows that appellant's injury-related condition did not prevent her from working in the modified clerk position which served as the basis for OWCP's February 19, 2010 LWEC determination. Dr. Krakauer provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>24</sup> Thus, appellant did not establish that modification of that determination was warranted because her injury-related condition had worsened such that she could no longer work in the modified clerk position. The Board finds that the special weight of the medical opinion evidence with respect to this matter rests with the April 8, 2019 opinion of Dr. Krakauer.<sup>25</sup>

In addition, the Board also finds that the evidence of record does not show that appellant has been retrained or otherwise vocationally rehabilitated such that modification of OWCP's February 19, 2010 LWEC determination is warranted.<sup>26</sup>

For these reasons, the Board finds that appellant has not met her burden of proof to modify OWCP's February 19, 2010 LWEC determination.

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<sup>23</sup> See *supra* note 19.

<sup>24</sup> See *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion). The Board notes that Dr. Krakauer considered all of appellant's accepted employment injuries in reaching his conclusions.

<sup>25</sup> See *supra* note 20.

<sup>26</sup> See *supra* note 17.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to modify OWCP's February 19, 2010 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board